Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

FIRST MERCURY SYNDICATE, INC.,

Petitioner,

vs.

TOWNSHIP OF BUFFALO; ALBERT T. ROENICK; CECIL D. FURER; TERRY L. BEGBIGLER; HERMAN J. STEPPLING; JOHN J. MORGAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED FOR REVIEW

When a declaratory judgment action requests declarations of rights on two issues and the district court dismisses the request for a declaration on one of the issues, is a summary judgment declaring the parties' rights with respect to the other issue appealable as a final decision under 28 U.S.C. §1291?

PARTIES

The caption of the case contains the names of all parties to this proceeding.

First Mercury Financial Corporation is the parent corporation of petitioner, First Mercury Syndicate, Inc. First Mercury Syndicate, Inc., has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The court of appeals did not write an opinion in this case. Neither the orders of the court of appeals nor the opinions and orders of the district court have been reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 12, 1997 (App. A1).

An order denying rehearing was entered by the court of appeals on July 23, 1997 (App. A19).

It is believed that jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the interpretation and application of 28 U.S.C. §1291, which states:

Final Decisions of District Courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in section 1292(c) and (d) and 1295 of this title.

The case also involves the interpretation and application of 28 U.S.C. §2201(a), which states:

Creation Of Remedy

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

First Mercury Syndicate, Inc., ("First Mercury") commenced this declaratory judgment action in the United States District Court for the Western District of Pennsylvania to obtain declarations that it had no duty under a public officials liability insurance policy it had issued to the Township of Buffalo ("the Township") to either defend or indemnify the Township and the other parties to the present action from the claims asserted against them in an action pending in the Court of Common Pleas of Butler County, Pennsylvania. The state court case is a class action which seeks to hold the Township, the members of its Board of Supervisors and solicitor liable for having allegedly converted an abandoned railroad right of way into a public trail in violation of the rights of the owners of reversionary interests in the land involved. Federal jurisdiction of the present action in district court was based upon diversity of citizenship in accordance with 28 U.S.C. §1332.

After the pleadings were closed the parties filed cross-motions for judgment with respect to both First Mercury's duty to defend and to indemnify the defendants in the state court action. However, the district court found only the duty to defend issue to be ripe for decision, explaining:

> "In the instant matter, the utility of declaratory judgment is patent. Without it, First Mercury runs the risk of breaching its duty to defend under the contract, and the Township could be hampered in its defense against the class action. These factors make the issue of First Mercury's duty to defend suitable for resolution by dispositive motion.
>
> However, to the extent that the parties also seek a ruling on First Mercury's duty to indemnify under the policy, this Court will exercise its discretion not to issue declaratory relief. Not only

> are there a myriad of potentially applicable policy provisions and exclusions, but resolution of Mercury's duty to indemnify is not yet ripe. Some of the provisions which First Mercury seeks to have construed may never even be at issue in the class action. The class action itself may yet be amended or withdrawn. The Township may prevail on all claims, either at trial, or by way of pretrial dispositive motion. By waiting until any future indemnification claim becomes more certain, legal efficiency, which is one of the goals of the Declaratory Judgment Act, is better served." (App. A11-A12).

The district court found the policy exclusions relied upon by First Mercury to be inapplicable to the underlying claims in question and, therefore, granted the defendant's motion for summary judgment with respect to the duty to defend and ordered that "plaintiff shall defend the defendants in the state court action, *Jones, et al. v. Township of Buffalo, et al.*, No. A.D. 94-10907." (District court order of February 27, 1997, App. A16.) It dismissed First Mercury's complaint with respect to its request for a declaratory judgment on the duty to indemnify and further ordered that "the clerk shall mark this case CLOSED." *Id.*

First Mercury appealed the district court's decision to the United States Court of Appeals for the Third Circuit. The defendants moved to have that appeal dismissed, asserting that the district court's order of February 26, 1997, was not final under 28 U.S.C. §1291 and citing the Third Circuit's decision in *The Fidelity & Casualty Co. of New York v. Carl & Ramagosa, Inc.*, 365 F.2d 303 (3d Cir. 1996). (Motion to Dismiss Appeal for Lack of Jurisdiction, ¶4, App. A18.) On June 12, 1997, the court of appeals entered an order granting that motion without opinion.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit in the present case is in conflict with the practice of the Seventh Circuit. The question is of importance because the practice of the Third Circuit limits the effectiveness of the remedy created by the Declaratory Judgment Act, 28 U.S.C. §2201(a).

In *Nationwide Insurance v. Zavalis*, 52 F.3d 689 (7th Cir. 1995), the plaintiff insurance company appealed the district court's dismissal of a declaratory judgment action seeking a declaration that it had no duty to either defend or indemnify a defendant in an underlying state court tort action. *Id.* at 690. The Seventh Circuit affirmed the dismissal of the indemnification issue but vacated the dismissal of the request for a declaration concerning the duty to defend. *Id.* at 697. On remand the district court held that Nationwide had no duty to defend the underlying suit by the Board of Trustees of the University of Illinois and both they and Nationwide's insured appealed. *Nationwide Insurance v. Board of Trustees of the University of Illinois*, 116 F.3d 1154, 1155 (7th Cir. 1997). While the Seventh Circuit demonstrated a sensitivity to the procedural aspects of the case by holding that the Board of Trustees lacked standing to appeal this decision (*id.*), it considered the insured's appeal on the merits and affirmed the summary judgment that had been entered in favor of Nationwide with respect to the duty to defend. *Id.* at 1158. Under the Third Circuit's decision in the present case, the district court's decision would not, of course, have been reviewable.

In addition to establishing the existence of a conflict between the courts of appeals, *Nationwide Insurance* indicates the desirability of a uniform rule regarding the

appealability of declaratory judgments. Since the homeowners policy involved in that case was issued in Pennsylvania, the substantive law of that state, rather than the law of Illinois, was controlling. *Nationwide Insurance v. Zavalis*, 52 F.3d at 693. While many factors may influence the choice of venue in such a situation, it is submitted that the question of whether a district court decision will be appealable should not be among them.

The district court order appealed from in the present case was final in both form and practical effect. It was formally final because it either entered judgment on or dismissed all of the claims in the case and directed the clerk to mark the case closed. Its practical effect was also final because the summary judgment ordering First Mercury to defend the defendants in the underlying state court action could not meaningfully be reviewed at a later time. The Third Circuit has previously held that a declaration that an insurer has no duty to provide a defense does *not* entitle it to recover any costs that it has previously expended on behalf of its insured. *Terra Nova Insurance Co. Ltd. v. 900 Bar, Inc.*, 887 F.2d 1213, 1220 (3d Cir. 1989). The Third Circuit's holding in the present case is thus tantamount to holding that a decision on the duty to defend cannot be reviewed until after it has become moot.[1]

It is questionable whether the Third Circuit's decision would make it possible for any part of the dispute originally submitted to the district court to ever be reviewed by the court of appeals. If a judgment is ultimately entered against the defendants in the underlying state court action, the plaintiffs in that action

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[1] Even if the applicable state law did not bar an insurer from recovering defense costs from its insured, it would, of course, often be difficult or impossible for an insurer to actually obtain repayment.

could assert in a state court garnishment proceeding that First Mercury is obligated to indemnify the defendants. *Helms v. Chandler*, 423 Pa. 77, 223 A.2d 30 (1966); *Butterfield v. Giuntoli*, 448 Pa. Super. 1, 12, 670 A2d. 646, 651 (1995), *appeal denied*, 546 Pa. 635, 683 A2d. 875 (1996). If First Mercury were then to refile its request for a declaratory judgment by the district court on the indemnification issue, the district court would have discretion to dismiss or stay the action in deference to the state court proceeding. *Wilton v. Seven Falls Co.*, 515 U.S. 227 (1995); *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942). While the indemnification question would then ultimately be resolved in state court, it is not seen how the district court's declaration of a duty to defend (even if not moot) would then be subject to review in any forum.

As the district court recognized in the present action, the early resolution of the duty to defend issue is important to both parties to a liability insurance policy because "Without it, [the insurer] runs the risk of breaching its duty to defend under the contract, and the [insured] could be hampered in its defense against the . . .[underlying] action." (District court opinion of February 26, 1997, App. A11-A12). This is but one example of the general objective of the Declaratory Judgment Act to provide a means to clarify legal relationships as expeditiously as possible and before actual injury has occurred. 12 JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE §57.02[1](3d ed. 1997). The practice adopted by the court of appeals in the present case would frustrate this objective.

Further, the refusal to permit an appeal from a declaratory judgment concerning insurance coverage is contrary to overall efficiency in judicial administration. While a decision regarding the duty to defend may not be dispositive of the duty to indemnify, it is usually nearly so.[2] An early final decision on the duty to defend will thus often provide the parameters for a settlement of the underlying action. The importance of this practical consideration has been recognized by this Court in the rule requiring the initial disclosure of insurance in all civil actions. Fed.R.Civ.P. 26(a)(1)(D).

The subsection of the Declaratory Judgment Act which creates that remedy ends with the direction that:

> "Any such declaration shall have the force and effect of a final judgment and decree and shall be reviewable as such." 28 U.S.C. §2201(a).

For this statutory directive to be effective a declaratory judgment entered in circumstances like those of the present action must be considered final and appealable when entered. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (holding that the denial of a government official's claim of qualified immunity is "final" and appealable when the right involved cannot effectively be vindicated at a later time).

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[2] While other factors may become important in particular cases, the major difference between the two is that the duty to defend is primarily determined by applying the policy to the underlying complaint while the duty to indemnify is determined by applying it to the factual and legal basis for the judgment actually entered against the insured. *See Nationwide Insurance v. Zavalis*, 52 F.3d at 693-94.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

Order of the United States Court of Appeals for the Third Circuit, Dated June 12, 1997.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

May 29 1997
B-126

No. 97-3167

FIRST MERCURY SYNDICATE,
Appellant,

v.

TOWNSHIP OF BUFFALO; ALBERT T. ROENIGK; CECIL D. FURER TERRY L. BERGBGLER; HERMAN J. STEPPLING; JOHN J. MORGAN

(D.C. Civil No. 96-cv-00261 DBS)

PRESENT: STAPLETON, COWEN AND SEITZ,
Circuit Judges

1. Motion by appellee to dismiss appeal for lack of jurisdiction.

s/ SUSAN M. ACERBA
Susan M. Acerba 597-3014
Case Manager

ORDER

The foregoing motion by appellee to dismiss the appeal for lack of jurisdiction is granted.

By the Court,

/s WALTER K. STAPLETON
Circuit Judge

Dated: JUN 12, 1997

SMACC TO: DPH, WDK

Memorandum Order of the United States District Court of the Western District of Pennsylvania, Dated March 17, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 96-261

FIRST MERCURY SYNDICATE, INC.,
Plaintiff,

vs.

TOWNSHIP OF BUFFALO, ALBERT T. ROENIGK, CECIL D. FURER, TERRY L. BEGBIGLER, HERMAN J. STEPPLING and JOHN MORGAN,
Defendants.

MEMORANDUM ORDER

Plaintiff First Mercury Syndicate, Inc. seeks an order vacating my previous Memorandum Order, and an order granting it oral argument regarding its motion to vacate.

Previously, I held that First Mercury had a duty to defend the Township of Buffalo under an insurance policy it had issued to the Township. I rejected First Mercury's contention that a deleted policy exclusion (exclusion C) remained subject to other exclusions in the policy. I noted that "[i]n interpreting an insurance contract which is as detailed as this one in providing exclusions, I would expect the endorsement deleting exclusion C to state explicitly that the deletion remains subject to all other exclusions. it does not so state, and

because First Mercury has not directed this Court to any policy language supporting its contention, I must reject it." Docket no. 15.

In the instant motion, First Mercury contends that my previous ruling was based on the fact that "the endorsement which deleted First Mercury's policy's exclusion for claims based on violations of civil rights failed to state specifically that all other policy exclusions remained in effect." First Mercury goes on to state that "the Court's reasoning is incorrect because the logical extension of that reasoning would compel the conclusion that all of the policy's exclusions have been negated as to *any* covered claims, not merely claims for violations of civil rights."

First Mercury then quotes the following language from the preface of the policy: "IN CONSIDERATION OF THE PAYMENT OF THE PREMIUM, IN RELIANCE UPON THE STATEMENTS IN THE APPLICATION MADE A PART HEREOF, AND SUBJECT TO ALL OF THE TERMS, COVENANTS, DEFINITIONS, CONDITION, EXCLUSIONS AND LIMITATIONS OF THIS POLICY:". According to First Mercury, this "policy[ ] language clearly supports the contention that coverage for the civil rights claims asserted in the underlying action was subject to the policy's remaining exclusions."

I deny First Mercury's motion. First, the logical extension of my previous ruling in no way compels the conclusion that all of the policy's exclusions have been negated as to all covered claims. I simply found that the deletion of exclusion C meant that all civil rights claims were covered under the policy.

In making my previous ruling, I was fully aware of the prefatory language that First Mercury contends allows it to avoid defending the Township in the underlying action. However, in construing a policy, a judge must consider "the 'policy in its entirety, giving the words their plain and proper meaning.'" *Anglo-American Ins. Co. v. Molin,* 673 A.2d 986, 988 (Pa. Cmwlth. 1996) (citation omitted).[1] I determined that this prefatory language was merely a tautological recital and provided no evidence regarding the manner in which deleted exclusions were to be applied.

My ruling was made in recognition of the principle that "[w]here ambiguous, insurance contracts are to be construed strictly against the insurer." *Pacific Indem. Co. v. Linn,* 766 F.2d 754, 761 (3d Cir. 1985) (citing *Mohn v. American Guaranty Life Insurance Co.,* 692 F.2d 289, 291 (1974). Furthermore, "[a]ny doubts regarding an insurer's duty to defend must be resolved in favor of [the] insured." *Atlantic Mut. Ins. Co., Inc. v. Acker,* 1993 WL 536133 at *5 (E.D. Pa. Dec. 17, 1993) (citing *American Contract Bridge v. Nationwide Mut. Fire Ins.,* 752 F.2d 71, 76 (3d Cir. 1985)).

I reaffirm my previous order that First Mecury must defend the Township of Buffalo in the underlying action. Plaintiff's motion to vacate my previous memorandum order is denied. Because Plaintiff has not designated any new issues for the consideration of this Court, its request for oral argument is also denied.

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[1] Although such a finding was not necessary to my original ruling, First Mercury would be required to defend the underlying action, regardless of its contentions in the present motion, if the complaint could be construed as one able to "reasonably be amended to state a claim under the policy." *Britamco Underwriters, Inc. v. Emerald Abstract Co.,* 855 F. Supp. 793, 798 (E.D. Pa. 1994) (citing *Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co.,* 766 F. Supp. 324 (E.D. Pa. 1991), *aff'd in part without op.,* 961 F.2d 209 (3d Cir. 1993)).

ORDER

AND NOW, this 17th day of March, 1997, Plaintiff's *Motion for Relief From Order Dated February 26, 1997,* docket no. 16, is DENIED.

BY THE COURT,

/s D. BROOKS SMITH
D. Brooks Smith
United States District Judge

cc: All Counsel

Memorandum Order of the United States District Court of the Western District of Pennsylvania, Dated February 26, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 96-261

FIRST MERCURY SYNDICATE, INC.,
Plaintiff,

vs.

TOWNSHIP OF BUFFALO, ALBERT T. ROENIGK, CECIL D. FURER, TERRY L. BEGBIGLER, HERMAN J. STEPPLING and JOHN MORGAN,
Defendants.

MEMORANDUM ORDER

Smith, District Judge

I. INTRODUCTION

Plaintiff, First Mercury Syndicate (First Mercury), has filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) requesting this court to declare that the company has no duty to defend or indemnify under an insurance policy it issued to the Township of Buffalo (Township). The defendants, the Township, its supervisors and its solicitor (referred to collectively as Township), have opposed Mercury's motion by filing a motion for summary judgment raising the same coverage issue.

Federal district courts are authorized to issue declaratory judgments under 28 U.S.C. §2201. This Court has jurisdiction pursuant to 28 U.S.C. §1332, and venue is proper under 28 U.S.C. §1391(a), as the actions alleged herein took place in the Western District of Pennsylvania.

II. APPLICABLE DISPOSITIVE MOTION STANDARDS

A. *Summary Judgment*

Summary judgment is to be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This court must view the facts and draw all inferences in the light most favorable to the non-moving party. *Ambruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

To withstand a motion for summary judgment, the nonmoving party must produce evidence which would be sufficient for a jury to render a verdict in its favor. If the evidence is merely colorable or not significantly probative, summary judgment should be granted. *Id.* "A disputed fact is 'material' if it would affect the outcome of the suit as determined by the substantive law." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Thus, a party opposing summary judgment may not rely on mere allegations or denials in the pleadings; rather, it must respond by setting forth specific facts that show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247.

B. *Rule 12(c) Motion for Judgment on the Pleadings*

First Mercury has moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). "After the pleadings are closed but within such time as to not delay the trial, any party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). The Third Circuit will not allow judgment on the pleadings " 'unless the movant clearly establishes that no material issue of fact remains and that he is entitled to judgment as a matter of law.' " *Kruzits v. Okuma Machine Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994) (quoting *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980)). The district court must "view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to . . . the non-moving party." *Institute for Scientific Info., Inc. v. Gordon and Breach, Science Publishers, Inc.*, 931 F.2d 1002, 1004 (3d Cir. 1991). If the plaintiff alleges facts that, if proven, would allow recovery, a 12(c) motion must be denied. *Id.* at 1005.

Because First Mercury's motion for judgment on the pleadings was followed by the Township's motion for summary judgment, this Court will engage in the type of analysis called for by Rule 56(c). Regardless of whether one deems this procedurally as making First Mercury's 12(c) motion moot, or as converting it to a motion for summary judgment under Rule 56(c), the result is the same. The less inclusive 12(c) motion has been subsumed into the more inclusive Rule 56(c) motion.

III. FACTS

The matter before me concerns the extent of coverage under an insurance contract. First Mercury, the insurer, is an Illinois corporation with its principal place

of business in Southfield, Michigan. The Township, a municipal subdivision located in Butler County, Pennsylvania, is the insured. The contract obligated First Mercury to provide the Township with a policy of Public Officials Liability insurance (policy number DOL 201740) which was effective from August 1, 1994 until August 1, 1995.

The policy specifies that the duty to defend is not separate from the duty to indemnify. The policy also provides that there is no duty either to defend or indemnify when one of the many coverage exclusions applies. Docket no. 1, exh. 1. Among the claims excluded from coverage under the contract are, *inter alia*, those claims involving: inverse condemnation, regulatory takings, adverse possession, equitable relief, punitive damages, wrongful acts of an attorney, damage or destruction to property, wrongful entry, as well as all reasonably pending claims not disclosed by the Township in its application for coverage. The preprinted contract also excluded coverage for civil rights violations under Exclusion C, although this exclusion was deleted by a policy endorsement. *Id.*

The instant dispute stems from a class action lawsuit filed in November of 1994 in the Court of Common Pleas of Butler County naming the Township as a defendant. *See Jones v. Township of Buffalo*, No. AD 94-10907, docket no. 1, exh. 2. The plaintiff class is composed of those persons, and their successors in title, who own the real property which comprises the former railroad right of way known as the "Butler Branch." Docket no. 1.

The plaintiff class alleges that on June 8, 1987, Conrail, then holder of the right of way, sought approval for abandonment of the Butler Branch, pursuant to 45

U.S.C. §748. The Interstate Commerce Commission approved the abandonment by final order on September 14, 1987.

According to the class, the Township then attempted to file a request for "Interim Trail use" with the ICC, as provided under the National Trails Systems Act and the rules of the ICC. Allegedly, the ICC advised the Township that, before the ICC could proceed with the request, it would be necessary for the Township to show that Conrail had not "consummated abandonment of the line." The complaint avers that the Township then withdrew its request for interim trail designation by a letter to the ICC dated September 12, 1990. The Township allegedly withdrew its request because it would be unable to prove that abandonment had not been consummated since the rails and ties had already been removed. Docket no. 1, exh. 3, ¶¶13-22.

Thereafter, the Township allegedly sought other means of acquiring control over the property comprising the Butler Branch, and made such attempts with full knowledge that the class had reversionary interests in the land in question.

The plaintiff class alleges several wrongful actions on the part of the Township. It alleges the wrongful removal of ballast, as well as trespassing and removal of fixtures by employees or agents of the Township. It also alleges false characterization of the property in question as a public trail, and charges that the Township of Buffalo encouraged members of the public to trespass upon the properties in question. Finally, the class claims that the Township has wrongfully received income, payments and rents for properties allegedly belonging to the class. *Id.*

According to the underlying complaint, all of these actions have been committed by the Township, but without resorting to its powers of condemnation under the Pennsylvania Eminent Domain Code. The class alleges that they "have been denied by ... Buffalo Township ... their Constitutional rights to their property, and Due Process of Law under the Constitution of the United States and the Constitution of Pennsylvania, and under the provisions of Article I, section 10 of the Constitution of Pennsylvania, and the specific protections provided by the Eminent Domain Code by the Defendants unlawful acts...." *Id.*

IV. DISCUSSION

A. *Declaratory Judgment*

Each party seeks a declaratory judgment in its favor concerning the duty of First Mercury to defend and indemnify the Township in the underlying class action.

The Declaratory Judgment Act is a procedural device which permits district courts to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. §2201. "Whether a district court decides to entertain jurisdiction under the act is a matter of judicial discretion." *Atlantic Mut. Ins. Co., Inc. v. Acker,* 1993 WL 536133 at *3 (E.D. Pa. Dec. 17, 1993) (citing *Zemel v. Rusk,* 381 U.S. 1, 19 (1965)). Declaratory judgment should be granted only when it will serve a useful purpose by clarifying and settling the legal relations at issue, or by affording relief from the uncertainty, insecurity, and controversy from which the proceeding stems. *Id.*

In the instant matter, the utility of declaratory judgment is patent. Without it, First Mercury runs the risk of breaching its duty to defend under the contract,

and the Township could be hampered in its defense against the class action. These factors make the issue of First Mercury's duty to defend suitable for resolution by dispositive motion.

However, to the extent that the parties also seek a ruling on First Mercury's duty to indemnify under the policy, this Court will exercise its discretion not to issue declaratory relief. Not only are there a myriad of potentially applicable policy provisions and exclusions, but resolution of Mercury's duty to indemnify is not yet ripe. Some of the provisions which First Mercury seeks to have construed may never even be at issue in the class action. The class action itself may yet be amended or withdrawn. The Township may prevail on all claims, either at trial, or by way of pretrial dispositive motion. By waiting until any future indemnification claim becomes more certain, legal efficency, which is one of the goals of the Declaratory Judgment Act, is better served.

B. *First Mercury's Duty to Defend*

Under Pennsylvania law,[1] an insurer's duty to defend is "fixed solely by the allegations in the underlying complaint[ ]." *Aetna Cas. and Sur. Co. v. Roe,* 650 A.2d 94, 98 (Pa.Super. 1994) (citations omitted). "The insurer is obligated to defend if the factual allegations of the complaint on its face comprehend an injury which is actually or potentially within the scope of the policy."

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[1] Under Pennsylvania law, the interpretation of an insurance contract is governed by the law of the state where the contract was made." *Jamison v. Miracle Mile Rambler, Inc.,* 536 F.2d 560, 562 n.1 (3d Cir. 1976) (citing *Crawford v. Manhattan Life Ins. Co. of N.Y.,* 221 A.2d 877, 880 (Pa.Super. 1966)). The issue of where the contract was made has not been raised by the parties, who both admit that the contract is governed by Pennsylvania law. Docket nos. 8 and 10.

Id. at 99 (citations omitted). "Any doubts regarding an insurer's duty to defend must be resolved in favor of [the] insured." *Atlantic Mut. Ins. Co., Inc. v. Acker*, 1993 WL 536133 at *5 (E.D. Pa. Dec. 17, 1993) (citing *American Contract Bridge v. Nationwide Mut. Fire Ins.*, 752 F.2d 71, 76 (3d Cir. 1985)).

When interpreting an insurance policy governed by Pennsylvania law, a district court must consider the "policy in its entirety, giving the words their plain and proper meaining." *Anglo-American Ins. Co. v. Molin*, 673 A.2d 986, 988 (Pa.Cmwlth. 1996) (citation omitted). This requires looking at the four corners of the complaint to determine whether the claim is one either covered by the insurance policy or one that "could reasonably be amended to state a claim under the policy." *Britamco Underwriters, Inc. v. Emerald Abstract Co.*, 855 F. Supp. 793, 798 (E.D. Pa. 1994) (citing *Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co.*, 766 F. Supp. 324 (E.D. Pa. 1991), *aff'd in part without op.*, 961 F.2d 209 (3d Cir. 1993)). "Thus, if this Court can identify at least one claim . . . which could potentially come within the coverage of [the] policy . . . then it must find . . . a duty to defend." *Home Ins. Co. v. Perlberger*, 900 F. Supp. 768 (E.D. Pa. 1995).

The Pennsylvania rule is based upon the sound policy that "[t]o make pleadings determinative and ignore whether a claim potentially may become one which is within the scope of the policy, would . . . turn the issue of coverage over to the vagaries of an opponent's pleadings." *Britamco*, 855 F. Supp. at 798-99.

Applying the above test to the matter at hand, I conclude that First Mercury has a duty to defend the claim in the underlying action. Key to that determination

is the recognition that First Mercury deleted Exclusion C of the pre-printed contract by an endorsement. The exclusion reads, in relevant part, as follows:

EXCLUSIONS.

> THE DUTY TO DEFEND IS NOT SEPARATE FROM THE DUTY TO PAY AND WE SHALL NOT HAVE ANY DUTY TO DEFEND WHEN ANY EXCLUSION APPLIES. WE SHALL NOT BE LIABLE TO MAKE ANY PAYMENT FOR 'LOSS' IN CONNECTION WITH ANY 'CLAIM' OR 'CLAIMS' BASED UPON OR ATTRIBUTABLE TO:
>
> * * *
>
> C. the deprivation of any rights, privileges or immunities secured by the Constitution of the United States of America or of any State or by the civil rights statutes of the United States of America, 42 U.S.C. 1983, or any other statute of the United States of America or of any State.

Docket 1, Exh. 1.

The allegations in the class action complaint allege:

> The defendants Buffalo Township, Buffalo Township Supervisors, individual defendants Albert T. Roengk, Cecil D. Furer, Terry L. Begbigler, Herman J. Steppling, and John J. Morgan and the Township of Jefferson and the Township of Winfield in concert, together and individually, and with full knowledge of the rights of the Plaintiffs, and with willful, wanton, and conscious disregard for the property rights of the Plaintiff, and in complete disregard of the rights of the Plaintiff Property owners, and acting as public officers were oppressive in their conduct in denying the Plaintiff property owners of their rights to their property as guaranteed in the Constitution of the United States and the Constitution of the Commonwealth of

> Pennsylvania, and the Eminent Domain Code of Pennsylvania by initiating a series of trespasses and continuing trespasses. . . .

Docket no. 1, Exh.2.

This averment asserts a claim based upon a deprivation of the rights and privileges secured by not only the United States Constitution, but also the Pennsylvania Constitution. It is, therefore, squarely within the coverage of the policy. Pennsylvania law imposes a duty to defend if there is "at least one claim" that is potentially within the coverage of the policy. *Perlberger,* 900 F.Supp. at 771-72.

First Mercury argues in its brief opposing summary judgment that, in spite of the deletion of Exclusion C, it has no duty to defend or indemnify because there are other applicable policy exclusions[2] which negate coverage. First Mercury, however, provides no support beyond a bald assertion of this proposition. The endorsement deleting Exclusion C states only that the exclusion has been deleted. No other conclusion can be reached than that First Mercury agreed to cover all civil rights claims made against the Township. In interpreting an insurance contract which is as detailed as this one in providing exclusions, I would expect the endorsement deleting exclusion C to state explicitly that the deletion remains subject to all other exclusions. It does not so state, and because First Mercury has not directed this Court to any policy language supporting its contention, I must reject it.

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[2] First Mercury contends that the following exclusions apply: B(3) for wrongful entry; P for inverse condemnation; M for wrongful acts of any attorney; A for damage to tangible property including loss of use; Q for actions seeking relief in any form other than money damages; V for punitive damages; and W for any wrongful act with respect to which the insured had knowledge prior to the effective policy date. Docket nos. 8 and 13.

Thus, in accordance with Pennsylvania law and the terms of the endorsement, First Mercury is required to defend the underlying action against the Township until it can "confine the claim to a recovery that is clearly excluded from the scope of the policy." *See Anglo-American*, 673 A.2d at 994.

ORDER

AND NOW, this 26th day of February, 1997, consistent with the foregoing Memorandum, it is hereby

ORDERED and DIRECTED that the defendants' Motion for Summary Judgment, docket no. 9, is GRANTED IN PART and DENIED IN PART. The motion is GRANTED to the extent that there is a duty to defend. Therefore, plaintiff shall defend the defendants in the state court action, *Jones et al., v. Township of Buffalo, et al.*, No. AD 94-10907. The motion is DENIED with respect to the duty to indemnify and plaintiff's complaint seeking a declaratory judgment on the duty to indemnify is DISMISSED without prejudice. Plaintiff's Motion for Judgment on the Pleadings, docket no. 7, is DENIED as moot. The clerk shall mark this case CLOSED.

BY THE COURT

/s D. BROOKS SMITH
D. Brooks Smith
United States District Judge

cc: All Counsel

Motion to Dismiss Appeal for Lack of Jurisdiction, Dated May 14, 1997.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3167

FIRST MERCURY SYNDICATE, INC.,
Appellant,

vs.

TOWNSHIP OF BUFFALO; ALBERT T. ROENIGK; CECIL D. FURER; TERRY L. BERGBIGLER; HERMAN J. STEPPLING; JOHN J. MORGAN,
Appellees.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

AND NOW come the Appellees, the Township of Buffalo; Albert T. Roenigk; Cecil D. Furer; Terry L. Bergbigler; Herman J. Steppling; John J. Morgan; (hereinafter referred to as "the Township"), and move this court to dismiss the appeal of First Mercury Syndicate, Inc. and in support thereof state the following:

1. The action in the court below was a declaratory judgment action seeking declaration of rights and duties pursuant to a contract of insurance.

2. Motions for Summary Judgment and for Judgment on the Pleadings were filed by all parties.

3. On February 26, 1997, the court entered an order granting in part and denying in part the Township's Motion for Summary Judgment: the court granted the Township's Motion regarding the issue of the duty to defend; the court denied the Township's Motion regarding the issue of duty to indemnify. The court dismissed without prejudice First Mercury's Complaint regarding the issue of duty to indemnify for the reason of lack of ripeness.

4. The order of February 26, 1997, which First Mercury is now attempting to appeal, is not a final appealable order as required by 28 U.S.C.A. Sec. 1291, and as such is an interlocutory order form which no appeal can be taken. *The Fidelity and Casualty Company of New York v. Carll and Ramagosa Inc.*, 365 F.2d 303 (1966).

WHEREFORE, Appellees move this court to dismiss Appellant's Appeal for lack of jurisdiction.

Respectfully submitted,

/s WILLIAM D. KEMPER
William D. Kemper

Sur Petition for Panel Rehearing of the United States Court of Appeals for the Third Circuit, Dated July 23, 1997.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3167

FIRST MERCURY SYNDICATE, INC.,
Appellant,

v.

TOWNSHIP OF BUFFALO; ALBERT T. ROENIGK; CECIL D. FURER; TERRY L. BERGBGLER; HERMAN J. STEPPLING; JOHN J. MORGAN.

(D.C. Civil No. 96-cv-00261 DBS)

SUR PETITION FOR PANEL REHEARING

BEFORE: STAPLETON, COWEN AND SEITZ,
Circuit Judges

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for panel rehearing, the petition for panel rehearing is denied.

By the Court,

/s WALTER K. STAPLETON
Circuit Judge

Dated: JUL 23, 1997

SMACC TO: DPH, WDK